

A P P E N D I X
VOLUME III

Supreme Court, U. S.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

No. 77-1163

E. RICHARD FRIEDMAN, O.D., et al.,
Appellants

VS.

N. J. ROGERS, O.D., et al.,
Appellees

No. 77-1164

N. J. ROGERS, O.D., et al.,
Appellants

VS.

E. RICHARD FRIEDMAN, O.D., et al.,
Appellees

No. 77-1186

TEXAS OPTOMETRIC ASSOCIATION,
INC., et al.,
Appellants

VS.

N. J. ROGERS, O.D., et al.,
Appellees

Appeals From The United States District Court
For the Eastern District of Texas

No. 77-1163 Filed February 16, 1978

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1163
No. 77-1164
No. 77-1186

Appeals from the United States
District Court for the Eastern District of Texas

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**[In the United States District Court
for the Eastern District of Texas]**

DEPOSITION OF DR. JAMES J. RILEY, JR.

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DIRECT EXAMINATION

BY MR. NIEMANN:

Q. Dr. Riley, will you please state your full name, address and occupation for the record.

A. Dr. James J. Riley, Jr., 1709 San Antonio Street, Austin, Texas, 78701.

Q. And are you a Doctor of Optometry?

A. Yes, I am an optometrist, practiced in Austin, Texas since June of 1948.

Q. Continuously, Doctor?

A. Yes.

Q. How long have you been a member of the Texas Optometric Association?

A. I was a student member in — when I studied optometry, and became a full — which was in 1946 and '47, and became a full member when I was licensed in 1948.

Q. Since that time, have you held any offices in the Texas Optometric Association?

A. Yes. I was secretary treasurer of the Texas Optometric Association for approximately 10 years, and 1955 to '64 or something like that as Chairman of the Legal and Legislative Committee for

eight years, 1956 to 1964. First Vice-President of TOA in 1966, and President from 1967 to 1969. Served as Chairman of the Board from 1971 until 1973, and have been on the Executive Committee since that time.

MR. KEITH: Since 1973?

THE WITNESS: Right.

Q. To expedite our conversation, Doctor, might I refer to the Texas Optometric Association as the TOA?

A. That's fine.

Q. All right. Would you again state when you were Legislative Chairman and when you were President?

A. All right. I was Legislative Chairman from 1956 to 1964 and President from 1967 to 1969.

Q. All right. During this last quarter of a century, Doctor, have you been active in the creation of the College of Optometry in Houston?

A. Yes, my father-in-law and I both were, along with Dr. Nelson Waldman in Houston, probably the two — or three most vigorous and outspoken proponents of establishing the College of Optometry in Texas. At that time, there was no college of optometry in the southwest United States. There was a definite need for it, but, in Texas, there was some objection to establishing a college because of the idea that it might produce a large volume of practitioners, and, therefore, be a problem economically for the then existing optometrists. So, we traveled the State and appeared at different

optometric meetings encouraging the optometrists generally, and particularly the members of the Texas Optometric Association, to support establishing a college.

Q. And did they do so?

A. Yes, and supported in two ways, in fact, and that was the important problem. We wanted it to be established at a college that was a State University. Now, the reason was that typically like — well, in the case of medicine, where medicine started in a barber shop and then graduated to private schools of medicine, and then in the early 1900s, finally moved to college supported schools of medicine, dentistry followed the same pattern, and optometry followed the same pattern of starting with a commercial or nonprofessional background, and then moved to private colleges of optometry. And, in the 1930s to 1940s, the trend was to move both the education of optometrists to better qualified educational institutions, but particularly those that were not private, were university affiliated. And, particularly desirable was the State University affiliation because the State Universities were better qualified in the health care sciences, they had the facilities, the adequate libraries, the adequate faculty and research faculties and the biological sciences and so forth to properly equip someone in the health care field for the study of medicine, dentistry, optometry, so it was necessary that we not only establish one, but then if possible, we have a state supported university establish the college.

Q. All right. Doctor, were you involved in the 1969 Optometry Act and its passage through the Texas Legislature?

A. Yes.

Q. Was that during the time you were President of TOA?

A. Yes.

Q. And were you intimately involved in the Special Committee of Senators and Optometrists that was appointed by the Governor to work out the legislative compromise?

A. Yes, I was.

Q. We want to come back to that in detail in a few moments, Doctor.

Could you tell us where your office is in the City of Austin and the general nature of your practice.

A. My office is at 1709 San Antonio Street, which is four blocks from the edge of the University of Texas campus, and because of the location and also because I have an interest in it, I have a fairly large proportion of my patients that are University of Texas students.

Q. From all over the State of Texas?

A. Yes. Being, of course, the University of Texas not only students from all over the State of Texas, but literally from all over the United States and all over the world. It's an interesting aspect of my practice. I see patients literally from doctors of every description and every level of education and level of expertise that you would probably ordinarily not see in an optometric practice.

Q. And among your patients, would your patients include those from what we have heretofore re-

ferred to as professional optometry in Texas as well as commercial optometry in Texas?

A. Yes. In other words, being not only because most of the — well, I am not sure of the percentage, but a large percentage of the students that I see as patients are students that are here temporarily, and they are coming in because of a problem. In other words, they remain a patient of the doctor that originally examined them and prescribed for them, and they would come into my office because of difficulties they have while they are away from home. So, I would be seeing patients from doctors both professional, commercial, medical, all kinds.

Q. Is there a commercial optometry office such as T.S.O. or Lee Vision in the general University area?

A. No.

Q. Are you the very closest optometrist to the University of Texas campus?

A. Yes.

Q. And you have practiced at the same location for —

A. Since June of 1948. Twenty-eight years.

Q. Doctor, a few moments ago, we referred to the phrase "professional optometry and commercial optometry." For the record, I would like to discuss and clarify those phrases as you are using them in this deposition. Could you describe in your own words generally what you mean by professional optometry and those concepts or practices or philosophies that are embodied by professional optometry.

A. Professional optometry is the term that we use to talk about the group of optometrists in this state whose first distinction is the fact that they are interested in the highest quality professional care, technical competence, properly equipped office, taking the necessary time to not only examine a patient adequately and properly, but to advise and counsel with them about any visual problems they have.

Q. Is this emphasis on quality affected in any way by your mode of appointments or mode of examinations?

A. Yes, the general rule for a professional optometrist would be that he would operate his practice on an appointment basis. In other words, the patient would not only have a specific hour but a specific length of time of — reserved for them when they come to the office so that adequate time is provided for the examination of the patient plus the fact that drop-in patients or patients coming in at random or not there as a reason for not taking the time and not making the effort to do a complete and thorough examination.

Q. How does this emphasis on quality relate to the means by which professional optometrists gain their patients?

A. Well, since the main way that a professional optometrist could expect to be professionally competent and successful would be by referrals and by building over a period of time a reputation of adequate care, of honesty and integrity and so forth, then the emphasis would be to provide that kind of practice and service for the patients since there is no way for them to get a patient except by their reputation, by the excellence of their care.

Q. You mean professional reputation and personal relationships and referrals is the exclusive way that professional optometrists gain their patients?

A. Yes.

Q. Does professional optometry rely on newspapers, television or radio or other media advertising to gain patients?

A. They not only don't rely on that method of obtaining patients, they both — their general information that is given at professional meetings, the code of ethics of the American Optometric Association and the Texas Optometric Association and Rules of Practice specifically prohibit their using this type of method for gaining patients.

Q. All right, Doctor —

A. So, they not only would not do it, they would be inclined to consider it an improper and unethical way to gain patients.

Q. Doctor, generally speaking, do professional optometrists have direct or indirect tie-ins with opticianries next door to their practice?

A. No, I said there are three basic ways you could describe a professional or ethical practitioner, and one is the — besides the quality and competence of care would be the economic independence. The typical thing for a professional practitioner would be to be a solo practitioner or a practitioner with one associate, usually a partner, sometimes employed, seldom employed, I might say, to have no direct connection with a laboratory. They might have some facilities in their office for mounting or edging lenses or for assembling a prescription

from the laboratory, although this is rare. And he would practically never have what we ordinarily consider laboratory facilities. And he would be free and encouraged again by both the practice management type of counsel and advice that's given at professional meetings, and by the limitations of the Code of Ethics Rules of Practice, so forth, would be inclined to have a free choice of laboratories. They would not be limited to one laboratory, would not be influenced by their concern with a special product or a special service. In other words, they would be free to choose what was best for the patient with no — because of their economic independence, with no concern, with a third party who might have some interest in their practice, or in whose business or business concern they might have some interest in.

Q. All right. Doctor, what is the relationship between professional optometry and continuing education?

A. The third distinction, I think, that we can make about professional optometrists would be both as individuals, and through their State Association, they have a long history of support and encouragement of law enforcement, of legal and ethical control of the practice of optometry, and upgrading of the competence of optometrists and the level of optometric education. They were the moving force in the initial Optometry Act. They have continuously since the initial Optometry Act been one of the leading forces in bringing the Optometry Act up to date periodically with the evolution of optometry, with the evolution of health care generally, and with the change both in the professional and business concepts that have occurred since 1920 when the first Optometry Act was en-

acted. They have demonstrated their concern for the improvement of optometric education as we've already mentioned by the establishment of the College of Optometry at the University of Houston. They also —

MR. KEITH: I object to the question. The answer is not responsive.

Q. All right. I will ask you another question, Doctor. Has there been an emphasis by professional optometry on continuing education in your conventions and seminars?

A. Yes. The optometric conventions and the local optometric societies have again a clear record of emphasis on continuing education at these meetings. We routinely have experts in the field of optometric education that attend the meetings and present an educational program during the time of the meetings. When the University of Houston College of Optometry was established, we asked them to also establish postgraduate education that could be brought away from the annual convention meeting, additional postgraduate education, both on the University campus where there would be special facilities for it, which would not be available at a convention meeting, and both at the society areas where people who were not able to come to a State convention for some reason would have the possibility of postgraduate education in their local area. And this has been done fairly regularly since the college was established.

Q. Does professional optometry play any role in the passage of the recent State statute requiring continuing education for license renewal?

A. Yes, the postgraduate education as a requirement for license renewal has been one of the legislative goals for our association since approximately 1967, in that general area. About the time I was president, it was set as one of the goals. Since that time, it's been continually one of the legislative goals. And in the 1969 session, the possibility of postgraduate education was part of the instructions that — and information that was sent out to our members prior to the session starting. And, at meetings during the year of 1968 and '69, the possibility of postgraduate education being considered was mentioned —

Q. Did TOA testify for the continuing education bills last year?

A. Yes, they testified they appeared both before the House Committee on Health Resources and the Senate Appropriate Committee. And, in the House, they actually gave testimony on behalf of continuing education, and officially endorsed the bill. And, in the Senate, they were present, did not give testimony, but did officially indicate their endorsement for the bill.

Q. All right. Doctor, you have been using the phrase "professional optometry" synonymously with the term "we." Are those two phrases, "we" and "professional optometry," are they also synonymous with the phrase "Texas Optometric Association"?

A. Yes, a large percentage of the optometrists in Texas, the ones who have the same general three distinctions that I've talked about, are associated in an association that's called Texas Optometric Association.

Q. Okay. Does TOA membership include only professional optometrists as members, at least those who are licensed optometrists?

A. The members of the Texas Optometric Association by and large I am sure would agree with all the basic points that I have made and would be in agreement in support of it. Like any association, we certainly have members that support our goals and aims —

MR. KEITH: I object to the answer as not responsive, and it does not answer the question that was presented.

Q. Doctor, is the membership in TOA generally limited to what you have described as professional optometrists?

A. Yes.

Q. Now, I would like to explore the phrase, "commercial optometry" as you're using it today, Dr. Riley. Could you briefly summarize what you think are the major concepts or characteristics of commercial optometry?

A. The easiest way to tell you what my opinion and my understanding of the phrase would be would be simply to contrast it with a professional group; wherein, the professional group, we talk about first the emphasis on quality examination, competence of care, so forth; and generally in commercial optometry, there would not be as great an emphasis —

Q. It's not to say commercial optometrists are incapable of rendering quality care or —

A. Absolutely not.

Q. — or that they do not render quality care?

A. Absolutely not. I make no statement about any individual commercial optometrists just as I made none about any individual professional optometrists. But, talking about the two groups and the way the terms are generally used, in general talking about the basic concept of what this would typically indicate the type of practice, the type of practitioner this would typically indicate is what I had in mind.

Q. Well, is this characteristic of a lesser emphasis on quality related in any way to the speed or volume of the optometric practice and commercial optometry?

A. Yes, commercial practice typically is based on the concept of a high-volume practice. A high-volume practice usually means that you work without appointments, that there is pressure to see that patient today because he may not be back if he waits and isn't seen. And, so, in the case of quality care, the likelihood, the possibility of a practitioner being in a position where he could easily take the extra time if necessary, extra time for consultation or examination, either one, would be less possible under those circumstances.

Q. Could you say that the mode of appointments was different between professional and commercial optometrists?

A. Yes, typically, commercial optometrists do not by appointment.

Q. A waiting line method?

A. Right.

Q. Generally speaking, are there obvious relationships or physical proximities between the commercial optometrists and opticians?

A. Yes, the commercial optometrist generally has some relationship with an optical concern, either direct or indirect where there is an influence and a control operated through the concern of the optometrist with his financial and economic dependence on the optical company or the optical manufacturer.

MR. KEITH: I object to the question as calling for an answer which is obviously no more than a gross conclusion by the witness and has no relevance to any issue before the Court.

MR. ARNETT: It seems to me the question and the answer have a large degree of relevance, and your objection seems to be aimed at the weight the Court should consider the evidence. Perhaps you should address that to the Court.

MR. KEITH: Unless the witness can testify to facts, he cannot offer any value whatsoever to the record of this case. If they want to ask him about facts, I have no objection.

MR. ARNETT: Whether or not it's the opinion that the statements offer relevant and useful evidence is something the Court will decide. We will have him testify to it here.

MR. NIEMANN: I will be happy to go into the question in depth.

Q. Dr. Riley, do you know a number of "commercial optometrists" in the State of Texas?

A. Yes.

Q. How many of those practice either next door or right in the immediate vicinity of an opticianry, such as T.S.O. or Lee Vision, One Price Optical or Look Optical?

A. Since I have lived in a fairly large city and lived in San Antonio and been a visitor and so forth generally in major larger cities of Texas, most of the commercial optometrists that I've been in contact with or have seen or observed and so forth over a period of the last 20 years have been commercial optometrists that have worked in establishment of Texas State Optical or Lee Optical.

Q. When you say "most," do you mean 50 percent, 60, 70, 80, 90 percent?

A. I was just trying to think of whether I've heard of some other commercial optical things like Look Optical or Mesa Optical, some of which are just different names for legal reasons. But I don't really know of any that I could say I have seen their office or know a practitioner in that office or have known a practitioner in that office that has what I call a commercial practice, except the ones that are associated with Texas State and Lee Optical. There could be one or two exceptions to that, but I don't think of any offhand.

Q. How many commercial optometrists are encompassed within your knowledge, within your acquaintance and your knowledge, that you refer to now?

A. Oh, gosh, I would say somewhere in the neighborhood of — you mean people that for instance I would know here in Austin, the optometrists in an office or I have actually talked to them in or out of the office or seen —

Q. Or know sufficiently enough about to be included within the figure you're giving me.

A. I would say about 15 or 18.

Q. Okay.

A. Or that I would be able to say —

Q. That you know personally.

A. Yes.

Q. Are you familiar with any commercial optometrist who is not practicing in the immediate vicinity and/or next door to an opticianry?

A. No.

Q. In your role as Legislative Chairman and President of TOA, did you have occasion to become familiar with the general nature of commercial optometry and commercial optometrists' tie-ins with opticianries either through discussions with legislators or discussions with other optometrists both professional and commercial around the State?

A. Yes, as an officer of TOA and as legal and Legislative Chairman, it's been both my duty and responsibility to meet with legislative committees over a period of time that have been concerned with regulation of optometry in Texas since roughly 1954 or '55. And that also, with members of the State Board of Optometry where TOA would have joint concerns of interest, and where we would frequently discuss the court actions that either TOA or the State Board were involved in at length, both with members of our association and with legal counsel for the Board and legal counsel for our State Associations, so I —

Q. Have you had occasion to read Dr. Rogers' deposition on the relationship between T.S.O. opticianries and the Doctors of Optometry who are his employees or who are his partners or who are independent practitioners in an associate office?

A. Yes.

Q. And are you aware, then, of the tie-ins or the relationship between commercial optometrists and opticianries being of that source?

A. Yes.

Q. What is the emphasis of commercial optometry in continuing education, Doctor, as you know it?

A. The only specific thing that I have any particular knowledge about is that in the July session when the continuing education bill was passed, well both in Dr. Rogers' deposition and at the meeting, the Board held on the continuing education after the fact of passage of the bill, the Texas Association of Optometrists Officers and Dr. Rogers both said they were opposed to continuing education. And that's the only thing I know about that.

MR. KEITH: Opposed to what?

THE WITNESS: Continuing education bill.

Q. Continuing education bill?

A. Right.

Q. That is the one that passed the Legislature?

A. Right.

MR. KEITH: They say they were opposed to continuing education or continuing education bill?

THE WITNESS: They were opposed to that particular bill.

Q. Doctor, have you read the Petition in the recent lawsuit filed by Dr. Freid, Et Al, against the members of the State Optometry Board seeking to declare the continuing education statute unconstitutional?

A. Yes, I have.

Q. Do you remember reading in that Petition that they sought to declare the statute —

MR. KEITH: I object to the question as calling for obvious hearsay. There is a Pleading that the Court ought to see —

MR. ARNETT: The question didn't call for hearsay answer. I believe the question was phrased, does he remember. It's not hearsay.

MR. KEITH: In the lawsuit, it is hearsay, and I object to it for that reason. Whether he remembers it or not is not hearsay.

But go ahead, Larry.

MR. NEIMANN: Get me a copy of the Pleadings.

Mr. Keith, I want to expedite the deposition, but if you want to fill it up, I'll be happy to introduce those pleadings into the record.

MR. KEITH: If he can vouch for those as being certified copies of the Pleadings, offer them.

MR. ARNETT: He can put them in as an exhibit to the deposition regardless of whether Dr. Riley certifies anything.

(Recess.)

Q. Doctor, is this the Pleadings that you have read to which you referred awhile ago?

A. Yes.

Q. And what is the style of that case?

A. I don't know that technical term, but if you mean the —

Q. Parties.

A. Sidney Freid, Dan Geller, Melchior Landin, Paul Knie, Mel Rockoff, Plaintiffs, and Hugh Stickse, Jr., E. R. Friedman, John Davis, Salvador S. Mora, John B. Bowen, N. Jay Rogers —

MR. ARNETT: I think that's enough.

A. Okay. As Defendants.

Q. Do you remember reading in this Petition that the Texas Association of Optometrists was also a Plaintiff —

A. Yes.

Q. — in the lawsuit?

A. Yes.

Q. Although not named in the style?

A. Right.

Q. And do you remember reading that in the prayer of the Lawsuit that —

MR. KEITH: I object to any reference to the document unless it is offered before the Court at the time of the deposition.

MR. ARNETT: Make that Exhibit No. 1, then.

Q. Do you remember reading in the prayer of the Lawsuit that the Plaintiffs asked that Article 4552-4.01B, Texas Revised Civil Statutes, be declared irreconcilable conflict with the First and Fourteenth Amendments to the United States Constitution, and thus null and void?

A. Yes, I remember reading that.

Q. Was Dr. Mel Rockoff a Plaintiff in that case?

A. Yes.

MR. KEITH: The Pleading itself is the best evidence of who the parties were and what their contentions were, and I will object to this witness's testimony or searches about his memory.

Q. Was the case filed in the United States District Court for the Northern District of Texas, Dallas Division?

MR. KEITH: I make the same objection. The Pleading itself under certificate of the Clerk constitutes the best evidence in its content.

MR. ARNETT: You may answer the question.

A. Yes.

Q. Is Dr. Mel Rockoff present President of the Texas Association of Optometrists?

A. I don't know for sure if he is, when the election takes place — he has been President. I am not sure that he is now. I think that he is.

Q. Is this a copy of the judicial Pleadings that we have been discussing, Dr. Riley?

A. Yes.

Q. Is that the copy of the Pleadings upon which you base your testimony?

A. Yes.

Q. To the best of your knowledge and belief, is that a true and correct copy of that which is on file in the Courthouse regarding this lawsuit?

A. Yes.

MR. KEITH: May I ask the witness on voir dire before the answer is completed?

VOIR DIRE EXAMINATION

BY MR. KEITH:

Q. Dr. Riley, were you a Plaintiff in that lawsuit?

A. No.

Q. Were you a Defendant in that lawsuit?

A. No.

Q. Are you an employee of the Clerk's Office in the Northern District of Texas?

A. No.

Q. Were you served with a copy of that lawsuit by the United States Marshal?

A. No.

Q. Have you ever been served with a so-called certified copy of any Pleadings in such lawsuit?

A. No.

MR. KEITH: I say the man is not competent to answer the question whether that's a true and correct copy of the Pleading on file in the Clerk's Office.

DIRECT EXAMINATION (Resumed)

BY MR. NIEMANN:

Q. Dr. Riley, I'll withdraw the question. And we'll cure his objection simply by asking the Clerk of the Court to present us with a certified copy of the Pleadings. Okay?

A. Okay.

MR. ARNETT: Let's do attach that as Exhibit 1 in this deposition, please.

MR. NIEMANN: At the request of the Attorney General, I would like to have this marked Exhibit No. 1.

(Defendant's Exhibit No. 1
(was marked for identification
(by the court reporter.

MR. NIEMANN: And, for the record, I would like to tender it into evidence acknowledging that the Plaintiff has stated an objection thereto.

(Defendant's Exhibit No. 1
(was offered into evidence.

Q. Doctor, as a practical matter, does the Texas Optometric Association include in its membership optometrists falling in what you have categorized as commercial optometry?

A. No.

Q. Is this by virtue of the general philosophy of the local associations?

A. I —

MR. KEITH: The question is leading. I object.

Q. What is the basis for the nonmembership of commercial optometrists in TOA?

A. Membership in the TOA can be obtained by an optometrist only if he is licensed to practice in Texas and makes application through a local society. Each affiliated society has a geographical area which comprises their society, and if they reside and practice in that geographical area, then they apply to that local society for membership. Upon their application, the local society meets with the member and makes whatever study or observation of his mode of practice that they consider proper and necessary, and then they send the application to the State Association with the recommendation as to whether he should be admitted in membership. As a general rule, the recommendation of the local society is the guiding factor in approval or disapproval.

Q. How about the philosophy of the local societies regarding commercial optometry?

A. The reason for it being that way is that the State Association feels that the local society would be the one best qualified to make judgments as to the mode of practice and general competence and ethical professional conduct of the person, and this would be based on the concept of what is professional and ethical by that society. And I know of no instance when I was secretary treasurer of

TOA nor of my personal knowledge since that time when a person who was then practicing as a commercial optometrist was admitted.

Q. Historically, have commercial optometrists been accepted into TOA membership?

A. No.

Q. Now, Doctor, I would like to turn your attention to the year 1967. Is that the year you were first elected President?

A. Yes.

Q. When did your term of office commence?

A. In April of 1967.

Q. Do you remember during that year appointments by the Governor of Texas to the Optometry Board and who those Appointees were?

Q. Yes, and at that time, there were two members, two Board members whose term had expired, and the Governor appointed Drs. Geller and Shropshire to fill those positions.

Q. It was Dr. Nate Rogers who had also already been on the Board that year?

A. Yes, he had been a member of the Board for a few years at that time.

Q. And do you remember the remaining members of the Board at that time?

A. Dr. Jim Gill at Waxahachie and R. Woods at Grape Vine.

Q. When were Dr. Geller and Dr. Shropshire appointed to the Board by the Governor?

A. I am not sure of the date. It was in '67, but I am not sure of the date.

Q. Do you recall during that year any meetings in which Dr. Geller, Dr. Shropshire and Dr. Rogers were the sole attendees?

A. You mean meetings of the —

Q. Meetings of the State Board — State Board of Optometry?

A. Yes, the meeting was held with Dr. Rogers and Dr. Geller and Dr. Shropshire. Again, I don't — I am not sure of the date. But, shortly after their appointment, and the — Dr. Rogers was elected President of the Board and Dr. Shropshire was elected Vice-President, and I believe Dr. Gill was elected secretary and treasurer. Dr. Gill and Dr. Woods were not present. And then at a subsequent meeting, the Board repealed the Professional Responsibility Rule.

Q. When you say "the Board," do you mean all five members voted to repeal the Professional Responsibility —

A. I mean those three members met again and repealed the Professional Responsibility Rule.

Q. Were Dr. Gill and Dr. Woods —

MR. ARNETT: Could I interrupt for a moment? When you say "the three men met," you mean that they held a meeting, or do you mean some other form?

MR. KEITH: I object to that as instructing the witness —

Q. Did they meet as a Board?

A. Yes.

Q. Did they purport to meet as a Board?

A. Yes. They sent out Notice of Meeting afterwards.

Q. By vote of the three Board members that you just mentioned present at the Board, did they attempt to repeal the Professional Responsibility Rule?

A. Yes.

Q. Could you explain for the Court the general nature and content of the Professional Responsibility Rule as it existed in 1967?

MR. KEITH: The rule itself would be the best evidence on the contents, and I object to this witness's offhand version of an official account of the publications.

MR. ARNETT: You may answer the question.

A. The Professional Responsibility Rule had been adopted by the Board after it had been considered by the Board over a period of time prior to its adoption. And public hearings had been held on it. The general concept of the rule was to establish the —

MR. KEITH: I object to the answer as not responsive. He said, "Describe the nature of the rule in its concept."

MR. NIEMANN: And I also asked for him to describe the general content of the rule.

Q. Would you please do so, Dr. Riley?

A. The Professional Responsibility Rule was a rule which required an optometrist practicing in Texas

to so conduct his practice that the patient would know who was responsible for his care, so that the relationship of the optometrists to opticianry or other commercial concern would not be a controlling relationship and would be a matter of record. And that briefly is the general concept of the rule.

Q. Was the Professional Responsibility Rule to which you refer promulgated prior to 1967 by the Optometry Board under its substantive Rule 19 power?

A. Yes.

Q. Was the general substance of that Professional Responsibility Rule embodied in the 1969 Optometry Act?

A. Yes.

MR. KEITH: I object to the question as calling for conclusion of the witness. The rule itself will be the best evidence of its contents, and the statute of the State would — the Court can make its own independent judgment without this layman's assistance.

Q. Dr. Riley, I am handing you a copy of the official Supplement to — Black Statutes, one of the civil statutes of Texas. Is that a copy of the Texas Optometry Act, 1969, as amended?

MR. KEITH: Larry, this is no way — I object to the manner in which you are trying to prove an act that's before the Court.

MR. NIEMANN: Lay off.

MR. KEITH: I am not going to lay off. It's an improper question. The witness can't testify as to whether that is or is not the Optometry Act.

MR. ARNETT: He can testify to it. Whether or not that's worth anything is another question, and we will certainly have the Act before the Court —

MR. KEITH: Then, offer the Act if you want to offer the Act in evidence.

MR. NIEMANN: It doesn't have to be offered into evidence. It's already into evidence by virtue of the law. I'm just asking him if that is what we're referring to.

(Off the record discussion.)

Q. Does it appear to be the Optometry Act in 1969 as amended?

A. Yes.

Q. Now, Doctor, at what section of the Optometry Act generally encompasses the substance of the old Professional Responsibility Rule.

A. It's Article 4552-513, Professional Responsibility.

Q. Thank you. Dr. Riley, what was the reaction of the professional optometrists to this attempted repeal of the Professional Responsibility Rule?

MR. KEITH: I object to the question as calling for a blatant conclusion on the part of the witness, that he is not competent to answer to what some of the ill-defined group of people did, what their personal reaction was to an official act of government.

Q. What was the general reaction of the members of the Texas Optometric Association to this attempted repeal of the Professional Responsibility Rule by Dr. Rogers, Shropshire and Geller?

A. I would say they were outraged.

Q. Do you say this from a position of speculation or knowledge?

A. On the notice that the rule had been purported to have been descended became public knowledge, there were quite a few general meetings held, both locally and on State level, and at all of those meetings, this was a major topic of conversation —

Q. Were you President of TOA during the time of the attempted repeal?

A. I was President elect in early 1967, and took office as President in April of 1967, so I was President or President elect during that time. And the fact that this rule had been a matter of hearing before the Board had been adopted and so forth, and then was at the — at a meeting where the Board was not fully representing optometry and did not have a quorum and so forth, that this kind of action was taken as a point of major concern with all the optometrists that I talked to at the time.

Q. Dr. Riley, in the Spring of 1968, were there Legislative races of the House of Representatives and also for the Senate?

A. Yes.

Q. During the period of time of those campaigns, did the membership of TOA to your knowledge talk to candidates regarding this attempted repeal of the Professional Responsibility Rule?

A. Yes.

Q. Could you elaborate a little bit more on that statement?

A. The — before all Legislative races, of course, the — our Association is active in informing our members as to the nature of matters of concern that might come before the next session of the Legislature, and indicate to them what our interests and priority interests might be, and asking them to contact their legislators during the time that they are running for office and make them aware of our concerns, particularly the ones that they have any reason to support, are interested in supporting, that they be aware of what we consider important concerns for the coming Legislature. And, at that particular time, the two things that we were concerned about were the appointments for the Board and their confirmation in the next session and the fact that the Professional Responsibility Rule had been purportedly repealed, and that there might be some legal action unless the Professional Responsibility Rule was clearly incorporated as a basic part of the Act. And that was such a fundamental part of our concerns in protecting the interest of the public, we thought that rather than having it remain a bone of contention within the Board, that if it were a legislative act, this would settle it once and for all, so —

Q. Dr. Riley, did the leadership of TOA ask the membership to discuss this purported repeal with their Legislative candidates?

A. Yes, and asked them both to discuss the method by which the rule was originally adopted by the Board, to point out the lengthy time, careful hearings, concern and so forth that was exercised before the rule was enacted, and then about the abrupt purported repeal of the rule with no hearing, no actions of any kind, and, by doing this,

make it clear to the members of the Legislature the need for having this part of the regulatory powers of the Board a part of legislation rather than a part of a Board rule.

Q. Did the leadership and membership of TOA realize that Drs. Geller and Shropshire would have their appointments reviewed and up for confirmation by the Senate in the next 1969 Legislature?

A. We knew that it would be in '69, that they would be up for confirmation, yes.

Q. Was this also part of the purpose of discussing this incident with the —

A. Yes.

Q. — senatorial candidates?

A. Yes. We were making the point that the action by these three members of the commercial element of optometry clearly indicated the need for this to be a part of the Optometry Act rather than a Board action. And —

Q. By the way, when you said "commercial element of optometry," let's identify Drs. Geller and Shropshire to your knowledge, Doctor.

A. Dr. Shropshire is an optometrist who at the time — I don't know now if he is, but at the time, he was an employee of Lee Optical, and Dr. Geller also.

Q. Is that the same Dr. Geller that was listed earlier as a Plaintiff in the lawsuit entitled *Freid versus Sticksel* —

A. Yes.

Q. — that we referred to earlier in the —

A. Yes.

Q. — deposition?

A. Yes.

Q. Would you characterize the membership of the Texas Optometric Association as inactive, semi-active, active in politics and legislative races, Dr. Riley?

A. Yes. I think that members of the Texas Optometric Association have a record of being very politically active, and have had since, to my knowledge, since the late 1940s.

Q. All right. Dr. Riley, I hand you an instrument dated May 27th, 1968. Would you please identify that for the record.

MR. KEITH: Let me see it, too.

Q. Would you please identify the instrument for the record, sir?

A. This is a legal Legislative bulletin put out by the Chairman of that committee on May 27th to call the optometrists to Austin for a meeting to discuss the confirmation of Geller and Shropshire.

Q. Was this during the time that you were President, Dr. Riley?

A. Yes. Yes, my name is on the letterhead.

Q. Is this a true and correct copy of the instrument, and was that instrument mailed to all members of TOA?

A. Yes.

MR. NIEMANN: I would like the court reporter to mark this as Defendant's Exhibit No. 2.

(Defendant's Exhibit No. 2
(was marked for identification
(by the court reporter.

MR. NIEMANN: I hereby tender it into evidence.

(Defendant's Exhibit No. 2
(was offered into evidence.

Q. Dr. Riley, was the matter of Dr. Geller's and Shropshire's appointment of such magnitude to call all of the optometrists in Texas to Austin who were members of TOA?

A. Yes.

Q. Why did you consider it so important?

A. Well, as we said in this letter, this was a combination of the legal and legislative battle that has been going on for 15 years or more that — and if the Board could be controlled by a majority of the commercial optometrists, then all of the efforts that we have made to more adequately enforce the Optometry Act, protect the visual welfare of the public of Texas will be lost.

Q. Doctor, was there any special session of the Legislature in mid-1968?

A. Yes, that was the reason for this notice. We knew that there would be a special session, and —

Q. Okay. Was it called by Governor Connally?

A. Yes.

Q. By virtue of the special session, were the appointments of Drs. Geller and Shropshire up for confirmation?

A. Yes.

Q. And did the special investigation prompt the July 2nd, 1968 letter that I have just handed you?

A. Yes.

Q. Would you please identify that instrument for the record?

A. That's a letter to all the TOA members signed by me and our legal Legislative Chairman, Phil Lewis, and telling them of this meeting and asking them to inform their Senators of our position on the confirmation of these two men.

Q. During that meeting, did you discuss the attempted repeal of the Professional Responsibility Rule?

A. Yes.

Q. Was this a basis by which you fought the confirmations of those two doctors?

A. Yes.

MR. NIEMANN: I ask the court reporter to identify the July 2nd, 1968 — to mark the July 2nd, 1968 letter as Defendant's Exhibit No. 3.

(Defendant's Exhibit No. 3
(was marked for identification
(by the court reporter.

Q. Was Defendant's Exhibit No. 3 the instrument which we have just been discussing?

A. Yes.

MR. KEITH: Are you going to offer it in evidence?

MR. NIEMANN: Yes, I hereby offer the instrument into evidence.

(Defendant's Exhibit No. 3
(was offered into evidence.

MR. KEITH: I object to it as being a self-serving hearsay document, and it has no place in this record.

MR. NIEMANN: Are you objecting to the relevancy of it?

MR. KEITH: I stated my objection.

MR. ARNETT: That's fine if you can get the Court to buy it.

He will have to get the Court to buy it.

MR. KEITH: Difficult as it may be, if you will, include the sidebar remarks in the record.

Q. Were Drs. Geller and Shropshire not confirmed by the Senate, Dr. Riley?

A. They were not confirmed, no, sir.

Q. And can you tell from Defendant's Exhibit No. 3 the date on which they were not confirmed by the Senate?

A. Yes —

MR. KEITH: The record of the Senate would constitute the best evidence of its official action, and no record of this witness or no reference to the hearsay document can prove that their confirmation was denied or approved.

MR. ARNETT: That's already in evidence in certified form.

Q. Dr. Riley, I would like to now discuss with you the 1969 Legislative session. And you were President, were you not, during this period of time?

A. Yes, sir.

Q. During the session, were there certain bills introduced which concerned professional optometry?

A. Yes.

Q. And the Texas Optometric Association?

A. Yes.

Q. And did TOA send out bulletins to its members regarding those bills?

A. Yes.

Q. Is this a copy of one of those bulletins?

A. Yes.

Q. Would you identify that for the record, please?

A. It's dated February the 7th, 1969, and it's a flash bulletin to all TOA members enclosing a list of the Senate Public Health Committee and the House Public Health Committee informing them of House Bill 106, and asking that they appear in opposition to it, and Senate Bill 124, which was the Senate Bill.

MR. NIEMANN: I would like the court reporter to mark that as Defendant's Exhibit No. 4.

(Defendant's Exhibit No. 4
(was marked for identification.

MR. KEITH: I object to the document, Defendant's 4, as it attempts to explain or constitute some summary or shorthand rendition of an enrolled bill or proposed bill. The bill itself would constitute the best evidence of its content.

MR. NIEMANN: Mr. Keith, it's not intended to be introduced for that purpose, but rather for the purpose of showing the legislative activity of the Texas Optometric Association during the 1969 session.

MR. KEITH: Well, the instrument, then, would constitute hearsay.

MR. NIEMANN: I don't think so.

Q. Dr. Riley, is this a true and correct copy from the files of the Texas Optometric Association —

A. Yes.

Q. — of that bulletin?

A. Yes.

MR. NIEMANN: I hereby offer it into evidence.

(Defendant's Exhibit No. 4
(was offered into evidence.)

MR. KEITH: I object for the further reason no proper predicate for this document has been shown. There is no showing this man was the custodian of this document, which is now some, by its own date, seven and a half years old. This is no more than a Xeroxed copy of some sort of a mimeographed process. There is a custodian of these records, and we have taken his deposition on three occasions.

Q. Dr. Riley, is that a copy of the letter that was sent out on that date?

A. Yes, to the best of my knowledge, it is.

Q. It went out under your approval, did it not, Dr. Riley?

A. Yes.

Q. As a matter of fact, you specifically approved the content of it, did you not?

A. Yes.

Q. Since you were President of the association at that time?

A. Yes.

Q. Would you say you might be considered one of the actual authors along with Dr. Lewis of this instrument?

A. Yes.

Q. As a matter of fact, Dr. Riley, on all of the letters that we have heretofore introduced into evidence or offered into evidence from TOA, were you not one of the co-authors of those letters as President of the association?

A. I would have approved all of them.

Q. The specific wording and content?

A. Yes, these two I know I helped draft. The May 27th one, I am not sure.

Q. And you vouch for the accuracy of those copies?

A. Yes.

(Off the record discussion.)

Q. Dr. Riley, I hand you another letter on TOA's stationery dated February 17th, 1969. Would you please identify that for the record?

A. This is again a bulletin from the Legal and Legislative Chairman calling for a meeting of all TOA members in Austin Monday, February the 24th to discuss the State Board appointment, House Bill 106, Senate Bill 124, and a copy of it was enclosed with the notice of the meeting.

Q. Did you also approve the specific wording of that letter?

A. Yes.

Q. Is it a true and correct copy of the letter that went to all the TOA members?

A. Yes, sir.

MR. NIEMANN: Would the court reporter please mark this Defendant's Exhibit 5.

(Defendant's Exhibit No. 5
(was marked for identification
(by the court reporter.

MR. NIEMANN: I offer Exhibit No. 5.

(Defendant's Exhibit No. 5
(was offered into evidence.

MR. KEITH: I object to it unless the entire document is offered. You are offering now only an excerpt. The document itself refers to an attachment which is not included in the offer. Absent, it is not in complete — I'm entitled to see what the men were sent if they were sent a letter with an enclosure or an attachment.

MR. ARNETT: Larry, if we don't have the attachment, you can proceed on that. We can take care of any objections later.

MR. KEITH: I am entitled to have it for Cross Examination.

MR. ARNETT: We don't have it. It's going to be difficult to get it for you.

MR. KEITH: You can withdraw the document. But, if he's going to offer it as an exhibit, I am entitled to have the entire exhibit read. If they have got a copy of it, attach it, fine.

(Recess.)

MR. NIEMANN: Back on the record.

Q. Dr. Riley, was Defendant's Exhibit No. 5, along with the enclosures referred to in the letter mailed to all members of the TOA?

A. Yes.

Q. The letter refers to House Bill 106 and Senate Bill 124?

A. Right.

Q. "Copy enclosed." Was that reference to the bills as they were originally introduced in the session?

A. As far as I know, yes. I just don't remember whether there was any change at that time or not.

MR. DAVIS: I'm sorry. I can't hear the witness down here.

A. I said, as far as I know, I don't recall if there was any change in the way it was introduced at that time.

MR. KEITH: I object if you are offering Exhibit No. 5. It's again constituting a self-serving hearsay document of which this witness is not the custodian, and no proper predicate has been laid for its admission.

Q. Doctor, were you one of the persons who approved and checked the exact language of that letter?

A. Yes.

Q. Would you qualify yourself as one of the co-authors of the letter although your name does not appear on it?

A. On that one, I would not be sure of that, but I would have checked — no legal bulletin is sent out without the President's approval.

Q. All right. Dr. Riley, did the introduction of these two bills indicate that a major optometric fight was brewing in the Legislature?

A. Yes.

Q. Was this of concern to the Legislators as well as the optometric community?

MR. KEITH: I object. This witness cannot testify as to what was a concern to the Legislature.

Q. Of the Legislators you personally knew —

A. Yes.

Q. — was this a major concern?

A. Yes.

Q. As President of TOA, were you informed by your membership that this was of major concern to the Legislature?

A. Yes.

MR. KEITH: I object to the question as leading because the document itself shows on its face that the man was not President of TOA at the time this letter went out.

MR. DAVIS: It's also hearsay.

MR. ARNETT: It's neither leading nor hearsay.

MR. KEITH: It's leading. It's not only leading, it's misleading.

MR. ARNETT: We may have an improper predicate. That doesn't make it leading.

MR. KEITH: He said "as President of TOA."

(Off the record discussion.)

MR. NIEMANN: Back on the record.

Q. When did your term of presidency expire, Dr. Riley?

A. In April of 1969. Now, let me — now, that — yes, that should be right, '67 and '69. Should be April '67 to April of '69.

Q. Okay. Now —

A. We can call the TOA office and verify that if it's important.

Q. Dr. Riley, did this fight brewing in optometry concern the Governor, to your knowledge?

MR. KEITH: That calls for again a hearsay conclusion on the part of this witness as to what did or did not concern a public official of Texas.

Q. Did the Governor do anything evidencing his concern over this optometric battle, Dr. Riley?

A. Yes, we had two or three conferences with the Governor, in fact, and —

Q. When you say "we," who is we?

A. Various members of the Executive Committee of TOA.

Q. Did it include yourself?

A. Yes, I was President of TOA at all the meetings we had with the Governor during the session in 1969.

Q. Did the Governor suggest anything to try to resolve the —

MR. KEITH: I object to the question as calling for a hearsay answer. If the Governor took some official act, that would be a Secretary of State level —

MR. ARNETT: You may answer the question.

MR. NIEMANN: Mr. Keith, I am not asking for official acts. I am asking for suggestions made to Dr. Riley by the Governor regarding the resolution of this optometric battle.

MR. KEITH: That constitutes the rankest sort of hearsay.

Q. Please answer the question. Did he make any suggestions to you?

A. Yes, we met with him at least two times that I can recall.

Q. Dr. Riley, I hand you a letter dated March 13th,

1969 on TOA stationery, and would you please identify that letter.

A. This is a bulletin sent out on March 13th calling to our members' attention the fact that Governor Smith had suggested the plan by which the professional and commercial optometrists would meet and attempt to arrive at a mutually acceptable legislative act to be presented to that session of Legislature.

Q. Is this a true and correct copy of that flash bulletin?

A. Yes.

Q. Did you approve the exact language of this flash bulletin?

A. Yes.

Q. Did you assist in writing it?

A. Yes.

MR. NIEMANN: Would the court reporter please mark this as Defendant's Exhibit No. 6.

(Defendant's Exhibit No. 6
(was marked for identification
(by the court reporter.

MR. NIEMANN: We offer it into evidence.

(Defendant's Exhibit No. 6
(was offered into evidence.

MR. KEITH: I object again. It constitutes compounded hearsay on the acts and statements of undefined third persons.

Q. Dr. Riley, it does indicate the activity of the Texas Optometric Association during that Legislative session, does it not?

A. Yes.

Q. It is written documentation of the compromised plan purportedly proposed by Governor Smith, does it not?

A. Right.

MR. NIEMANN: I hereby offer it into evidence acknowledging Mr. Keith has stated his objection.

Q. Dr. Riley, I hand you now a letter dated March 21st, 1969, on TOA stationery. Would you identify that, please?

A. This is a bulletin from the Legal Affairs Chairman to TOA members discussing the Governor's plan to have representatives meet from commercial and ethical optometry to attempt to reach an agreed legislative act to be presented to that session and lists who the members of the committee were.

Q. Is it a true and correct copy of what was sent out to all members of TOA that date?

A. Yes.

Q. And as President of the association, did you approve the wording of this bulletin?

A. Yes.

Q. Did you in fact help author it?

A. Yes.

Q. Did you authenticate its accuracy?

A. Yes.

Q. Did you authenticate the accuracy of all the letters of TOA that we've heretofore offered into evidence?

A. Yes.

Q. Dr. Riley, I notice that on the fourth paragraph —

MR. NIEMANN: Before I forget, would the court reporter please mark that as Defendant's Exhibit No. 7.

(Defendant's Exhibit No. 7
(was marked for identification
(by the court reporter.

MR. NIEMANN: I hereby offer it into evidence.

(Defendant's Exhibit No. 7
(was offered into evidence.

MR. KEITH: I object again to the hearsay document for which no proper predicate has been laid.

Q. Dr. Riley, I call your attention to Paragraph 4 of the letter in which it lists a committee of Senators. By whom were those Senators appointed?

A. The Governor suggested that each party select three Senators to represent them in deposition, and the TOA selected Senator Creighton, Herring and Word, and the commercial optometrist selected Senators Strong, Bates and Wilson.

Q. And was that, to the best of your knowledge, the way in which Governor Smith appointed these Senators?

A. Yes.

Q. Now, as a practical matter, did all of these Senators on a continuous basis deal with the various drafts of the legislation, or was it a fewer number?

A. Senator Creighton and Strong, to the best of my recollection, attended all meetings and were in constant contact. The other Senators were present at the first few meetings, and then irregularly after that.

Q. Were there, you might say, unofficial members of this committee, in other words, optometrists from professional optometry and commercial optometry?

A. Yes.

Q. Who are the optometrists from the professional segment?

A. Myself, Dr. Friedman and Dr. Day.

Q. Is that Dr. —

A. Robert E. Day and E. R. Friedman.

Q. The same Friedman that is now a Board member?

A. Yes.

Q. Who are the commercial optometrists unofficially on this committee?

A. Dr. N. J. Rogers and Dr. Ellis Carp.

Q. Who is Dr. Ellis Carp associated with?

A. Lee Optical.

Q. Out of their Dallas headquarters?

A. Yes.

Q. Dr. N. J. Rogers was the same Nate Rogers who was the Plaintiff in this suit?

A. Yes.

Q. Did the committee of optometrists and Senators Creighton and Strong meet on repeated occasions to discuss the content of the proposed bill that would resolve the optometric battle?

A. Yes.

Q. Did the final version of the bill which was adopted by the Legislature, did it go through a number of drafts which were discussed and rediscussed by all members of this Committee?

A. Yes. A bill, Senate Bill 781, as I recall, was the number, and it was introduced, and then immediately pasted over and cut up and redrafted and resectioned for quite a period of time, and then when the final draft was agreed to, it was presented and with the understanding there would be no amendments of changes, and that there were none or only one or two agreed changes, and that was the bill that was adopted.

Q. Okay. Can you give me some of the major elements of — first of all, did this bill represent a compromise between professional —

MR. KEITH: What bill?

MR. NIEMANN: Senate Bill 781 that was finally passed. We referred to it, Mr. Keith, while you were whispering to your client.

MR. KEITH: I heard reference to Senate Bill 781,

and now you're talking about "the bill." He said there was some bill went through a number of drafts. Then you said "the bill."

MR. ARNETT: It's been clarified —

MR. NIEMANN: Senate Bill 781.

MR. ARNETT: — as finally passed.

Q. Was it a compromise bill?

A. Yes.

Q. What were the basic elements of the compromise between professional optometry and commercial optometry in this bill?

A. The commercial element was particularly opposed to the rule-making power of the Board, and we agreed to — power of the Board to make substantive rules being eliminated or restricted, and with the understanding that with that agreement that there would be a composition of the Board that would insure that a majority of the members were members of TOA.

Q. Was there also an agreement regarding incorporating present Board rules into the statute?

A. Yes. The agreement was that there would be no further rules made, but the ones that had already been adopted would become part of the statute?

Q. Were you able to reach agreement on price advertising?

A. No.

Q. Dr. Riley, I hand you now a Xeroxed copy of a letter dated May 1st, 1969. Would you please iden-

tify that for the record?

A. This is a memorandum that we sent to the Governor telling him that the bill had been agreed upon with the exception of the parts that were not acceptable to both sides, which were to be arbitrated.

MR. KEITH: I object to the answer as being unresponsive to the question and contradicting the letter of May 1, 1969.

Q. Would you attempt to identify the letter again stating who the letter is to and who the signatures are on the letter.

MR. KEITH: The letter will speak for itself as to who the signatures are. If he recognizes the signature, he can state it.

Q. Would you please answer my question, Dr. Riley?

A. The letter was to Governor Smith and was a report from the committee signed by members of the committee and stating that they had agreed on certain matters, and that the other matters were to be arbitrated.

Q. At the lower left-hand corner of the first page of this letter, there are two signatures. Would you identify those signatures?

A. Lower left-hand corner.

A. That's Jack Strong and Tom Creighton.

Q. And at the lower right-hand side, reading from top to bottom, would you identify those signatures?

A. That's Jay Rogers, Ellis Carp, James Riley, Friedman, E. R. Friedman and Robert E. Day.

Q. Is that a true and correct copy of the instrument that it purports to represent, Doctor?

A. Yes.

Q. Were you in fact signatory to this instrument?

A. Yes.

Q. Did you assist in drafting the cover letter?

A. Yes.

Q. Now, I turn your attention to Pages 2 and 3 that are attached to the letter entitled "Memorandum." What basically do those two pages represent, Doctor?

A. It's an outline of changes in the bill that we agreed to, or corrections, generally. And then that we agreed to submit to arbitration the other matters mentioned.

Q. All right. I notice on Page 2 of the memorandum part of it is x-ed out. Is there any explanation for that?

A. Yes, this was the part that was not acceptable, and that Senator Strong marked out, at our request before we signed it.

MR. NIEMANN: All right. I would like to have the court reporter mark this as Defendant's Exhibit No. 8.

(Defendant's Exhibit No. 8
(was marked for identification
(by the court reporter.

MR. NIEMANN: And I offer it into evidence as a true and correct copy of that letter.

(Defendant's Exhibit No. 8
(was offered into evidence.

Q. Following the signing and submission of this letter, Dr. Riley, could you tell us what happened next?

A. The bill was — the matters that were up for arbitration were arbitrated, and the results of that arbitration were incorporated in the bill, and the bill was submitted to the Legislature and passed.

Q. To whom were they submitted to arbitration?

A. The arbitrator was Senator — Mr. Le Maistre, Charles Le Maistre who at that time was the head of the University of Texas School of — I mean University of Texas System Health Education Group.

(Off the record discussion.)

Q. Dr. Riley, I hand you now an instrument which purports to be the front page and fifth page of an instrument, and could you identify that for the record?

A. This is the first and the fifth page of the substitute to Senate Bill 781 which was part of the agreement.

Q. On the second page, Dr. Riley, on Line 13, does that purport to represent the clause requiring four members of the Board to be members of the State Association affiliated with TOA?

A. Yes.

Q. Were you involved in the preparation of this particular draft?

A. Yes.

Q. That this page represents?

A. Yes.

Q. Was it a cut and pasted job, so to speak?

A. Yes.

Q. And was that particular phrase cut and pasted in?

A. Yes.

Q. How do you know?

A. You can tell by the way the copy is made where the — part of it is copied, and then part, there is a different way this was taken out, and something was pasted in there. That was frequently done.

Q. Dr. Riley, as a practical matter, does this mean that four members of the State Board need to be members of TOA?

A. Texas Optometric Association is the only association affiliated with the American Optometric Association.

Q. Did everybody that was a party to this compromise or was involved, did they realize this to be a fact?

A. Yes.

Q. As a practical matter, was this a subject of controversy in the drafting of this proposed bill?

A. Yes, it was the subject of a great deal of discussion with members of that committee. And —

Q. Why?

A. — a great deal of — the professional association had recommended that the bill include a provision that the Governor would appoint members of the Board from a list that had been approved by the Texas Optometric Association —

Q. Why?

A. Because of their belief that members of the Texas Optometric Association would make better members of the Board and would be more apt to protect the public interest. And the commercial element was, of course, opposed to this, but part of the agreement on the compromise was that if we agreed to the rule-making powers of the Board being limited, that they would then agree to the Board having a majority of members who were from the Texas Optometric Association.

Q. Did you explain to the members of the committee the reasons why TOA felt that this membership requirement was important?

A. Yes. We discussed at length with Senators of that committee the reason why we felt that the membership in the Texas Optometric Association was an important basic part of any new Optometry Act.

Q. You did explain the reasons?

A. Yes.

Q. Could you summarize those reasons for us?

A. We felt that a member of the Texas Optometric Association would make a better member of the Texas Optometry Board because of their emphasis

on quality of examination, competence of examination, their economic independence, their freedom from outside influence of outside interests, commercial interests and so forth, and because of their track record of support of law enforcement and improvement of education for optometrists in the State.

Q. Now, Doctor, is this information that you've thought of purely for the purpose of this lawsuit, or was this the subject of actual conversation between you and members of that special senatorial committee appointed by the Governor?

A. It was discussed with the members of that committee.

Q. By whom?

A. By me and by Dr. Day and by Dr. Friedman, and was discussed at length. I've summarized the basic elements, but the general concepts were enlarged upon frequently because this had been a general idea that we had discussed and had debated within the association for the last two or three years. This is part of the general concept that the Board could best protect the public if the members of that Board were men of the greatest competence and highest integrity and honesty. And we felt the best possibility of that being true was for them to be members of the Texas Optometric Association or selected by the Texas Optometric Association.

Q. Did you refer to the specific example of the attempted repeal of the Professional Responsibility Rule when you're referring to a track record of law enforcement?

A. Yes. And when this was debated, it was natural that the people representing commercial optometry would question whether this was true or not, and we discussed again at length the fact that the one time that they had had a majority of the Board, the specific action they took, we felt, substantiated our argument that the Board would best serve the public if the majority of the members were members of the Texas Optometric Association.

Q. Did you discuss with members of the committee this concept of economic independence, and did you give them specific examples?

A. Yes.

Q. Did you discuss with them the concept of quality care?

A. Yes.

Q. In your discussions with the Legislators, did you ever make reference to a letter purportedly written by Dr. Shropshire in 1961?

A. Yes.

Q. Is this a copy of the letter to which you refer?

A. Yes.

Q. I hand you an instrument dated February 15th, 1961, purportedly on the stationery of Dr. C. T. Shropshire. Is this a true and correct copy of the instrument that you showed to various members of that committee?

MR. KEITH: I ask leave to take the witness on voir dire if I may before he answers the question.

MR. NIEMANN: I would like to finish some identification questions, and then you may take him on voir dire, Mr. Keith.

MR. KEITH: Before his reference to — are you going to label this thing?

MR. NIEMANN: Not yet.

MR. KEITH: Are you going to give it a number?

MR. NIEMANN: Not yet.

MR. KEITH: I am entitled to ask him some questions about it before you interrogate him with respect to it.

MR. ARNETT: Let him ask the questions.

MR. NIEMANN: I would like to ask my question first.

Q. Is this a copy of the —

MR. KEITH: Is what? I object to any reference to any document until it's been identified so the Court will know precisely what we're talking about.

MR. NIEMANN: I ask the court reporter to mark this as Defendant's Exhibit No. 9.

(Defendant's Exhibit No. 9
(was marked for identification
(by the court reporter.

Q. Dr. Riley, is this a true and correct copy of the instrument which you gave to members of the committee?

A. Yes.

Q. This particular letter copy was used both before that committee and before other members of the Legislature during that session to emphasize some of the points we were making on — for persons not being — the fact that when they were not economically independent, it could affect their professional judgment?

A. Yes.

MR. NIEMANN: Do you want to take him on voir dire, Mr. Keith?

VOIR DIRE EXAMINATION

BY MR. KEITH:

Q. Doctor, you have been shown Exhibit No. 9. Do you have the original of this document?

A. No, I do not.

Q. Did you ever have the original of such document?

A. I —

Q. I mean the original writing of this by the supposed Dr. Shropshire?

A. I have never had such a thing.

Q. Did you ever have any signed copy of this letter?

A. I have never had such a letter.

Q. And you do not have such now?

A. I do not have such now.

Q. You are not testifying under oath as a matter of personal knowledge Shropshire wrote this letter?

A. I am not.

Q. Or that he ever said anything contained in the letter?

A. I am not.

Q. And was the letter sent to you, mailed to you purportedly by Dr. Shropshire?

A. No.

MR. KEITH: I object to it as constituting hearsay, and any further reference to the letter to be.

DIRECT EXAMINATION (Resumed)

BY MR. NIEMANN:

Q. Doctor, to make it clear, I am not discussing this with you for purposes of authenticizing this as a letter from Dr. Shropshire, but rather authenticizing this is a true and correct copy of that which you gave to the members of the Legislature.

A. Right.

Q. Particularly to the members of this committee.

A. Yes.

Q. Did you give a Xeroxed copy or a copy of this letter to members of that committee?

A. Yes.

Q. Were copies of this letter given to various members of the Legislature —

A. Yes.

Q. — by members of TOA?

A. Yes.

Q. Were they asked to do so?

A. Yes.

Q. Do you know whether Dr. Shropshire was aware that this letter was given to members of the Legislature —

A. No, I do not.

Q. — members of the Legislature at this time? Was this letter part of the basis by which you discussed the subject of quality care?

A. Both quality care and independence with financial influence, economic influence.

Q. Doctor, because of the optometric terms utilized in the letter and because of the nature of the Xerox copy, would you please read the letter for the record so there will be no mistake about the interpretation of the words?

A. Do you want me to read all the letter?

Q. Please.

A. "From the desk of Dr. C. T. Shropshire.
February 15, 1961.

"Dear Doctor, On February the 28th, please remove the following frames from your stock and display and transfer back to Dal Tex."

And I cannot read the line below that, but I assume it was the —

MR. KEITH: I object to this man's assumption.

Q. Don't assume anything.

A. "You will not order or sell these members when your office changes to the new price policy March 7th. All other frames will remain and will be included in our advertised prices. It is mandatory that all personnel adhere to the new price structure without deviation.

"May I suggest that the prescribing of bifocals be limited to Kryptoks. However, if a patient is wearing or requires a Flat Top or Ultex, you should prescribe it. Trifocals, Executives, Baseballs, Lenticulars, and so forth should not be prescribed or fitted."

And that's underlined, "but should not — Trifocals, Executives, Bifocals, Lenticulars, so forth should not be prescribed or fitted" is underlined. "Even if a patient is willing to pay more for such. Do not charge more than the advertised price under any circumstances.

"We plan an extensive advertising program to acquaint the general public in your area of the terrific value in eye wear and eye care available at your office. Increased traffic through your doors will reflect a healthy office.

"Your cooperation and enthusiasm will insure a successful office operation now, and in the future, as well."

And then something I cannot read. And then, "Thank you" and something I cannot read, and then, "Dr. Shropshire."

MR. NIEMANN: Does the court reporter have any questions about the technical words?

MR. V. ROGERS: Dr. Riley made a couple of mistakes, one where the rereading in the underlined portion, he referred to Baseballs as bifocals. So, the court reporter should recognize that.

MR. NIEMANN: That's what I was afraid of, technical language.

Q. Would you reread the second paragraph so there is no doubt?

A. I will be glad to. "May I suggest the prescribing of bifocals be limited primarily to Kryptoks. However, if a patient is wearing or requires a Flat Top or Ultex, you should prescribe it. Trifocals, Executives, Baseballs, Lenticulars, and so forth, should not be prescribed or fitted. Even if a patient is willing to pay more for such. Do not charge more than the advertised price under any circumstances."

MR. DAVIS: We would like the written record to reflect the witness has been reading from a disassembled and disconnected, in part illegible, letter, the materiality of the illegible parts being undeterminable from this purported copy, and further that this purported copy has been in respects smudged and extremely difficult if not impossible to decipher, and further that this copy appears to have been made from another or other copies or secondary renditions of the original.

Q. Dr. Riley, would you describe the significance of this letter as you explained it to the members of that committee?

A. Our point —

MR. KEITH: I object. This constitutes the rankest form of a self-serving declaration and a hearsay statement.

MR. NIEMANN: Mr. Keith, I am just asking him what he told —

MR. KEITH: I am leveling my objection to it.

MR. ARNETT: Let's not argue over the objections now. Let's have the witness answer the question.

MR. KEITH: I can make my objection and he can answer the question if he —

Q. Answer the question. What did you explain to the Senators regarding this letter?

A. The point in using this letter as an example of the possibility that commercial optometry's quality of eye care and control by — and the effect it could have on their personal judgment to be under the influence of control of a commercial third party was two or three things: First, a Kryptok bifocal is an inexpensive, less desirable, less efficient type of bifocal —

Q. Than what?

A. Than a Flat Top or Ultex, which would be again a better — optically a better type of bifocal, and particular Trifocals and Executives and Baseballs, Lenticulars, are the type of lenses that certain patients would require because of special need.

Trifocals would be required because the patient would be at the point where, like in my case, where I cannot see clearly beyond or at arm's length except through Trifocals, so if my profession or my occupation required me to operate regularly at that distance, I would be very handicapped not to have that available. An Executive is a straight-lined bifocal that gives a wider field of vision up near, less image jump going from the top of the lens to the bottom of the bifocal. Therefore, again, if I were in an occupation that would

require me to continually use that area and to go from top to bottom, they would make a significant difference in my — both my comfort and efficiency whether that was available for me or not. Baseball is a name for a trifocal where the bifocal is at the bottom and the trifocal is at the top, so that the person in a special occupation like a paint trimmer, for instance, could see at again at arm's length looking through the top of his glasses, and anyone that needed that particular type of trifocal would be severely handicapped in their work if it was not made available to them. Lenticulars are lenses that, because of the strength of the correction, the optical power of the lens is a segment in the middle, and a carrier lens used to fill out the frame so that the weight and distortion due to the large Lenticular — large refractive power is minimized, and again, not being available to a patient would mean that patient would not be given the best care possible.

And then we pointed out that following this, "Even if a patient is willing to pay more for such." In other words, there would be no question but what the patient's best interest would not be served even if the patient were wise enough to know the need for that particular type of thing and to request it, and when told it was not available, say, "If it costs more, I'll pay for it," they would say, "No, it is not available."

Q. Now, Dr. Riley, are Kryptoks generally a cheaper variety of bifocals?

A. They are much less expensive.

Q. Than what?

A. Than a Flat Top or Ultex type of corrective curve

or Trifocals, Executives, Baseballs, Lenticulars and so forth.

Q. When you say, "much less," how much, generally speaking, in terms of percentage?

A. About, I would say, roughly 40 percent of the others.

Q. All right. If a doctor followed a procedure of not prescribing Trifocals, Executives, Baseballs, Lenticulars in a normal practice, would that be a departure from what you characterize as quality in care?

A. Yes, it certainly would be.

Q. Are Trifocals, Executives, Baseballs and Lenticulars more expensive type of lenses?

A. Yes.

Q. Than what?

A. Than Kryptoks or the typical Flat Top or Ultex bifocal.

Q. Was a shorthand version of what you have just stated regarding the significance of this letter dated to the members of the senatorial committee preparing the compromise draft version in 1969?

A. You mean an actual document of the —

Q. Was an explanation or discussion of this letter —

A. A brief discussion of it was made, yes.

Q. Do you have reason to believe that a discussion of this letter was also had between other members of TOA and members of the Legislature?

A. Yes.

Q. In the House?

A. Yes.

Q. In the Senate?

A. Yes.

Q. Why?

A. When any matter of legislative concern with TOA is going to be heard before a committee of the House or Senate, or is up for legislative action, the members are not only notified of the — of that possibility or probability, but also are informed of our position on it, and then are given the information that we might have. It would help make the basic concepts that made us be particularly for or against a bill, the basic concepts that could be supported by some kind of evidence. And, so, we would make up what we call a kit where we would actually have documents like this and brief explanations of the major points of the bill and so forth, and we would send this to them, or we would —

Q. When you say "them" and "they," are you referring to members of —

A. The TOA members, yes.

Q. Okay. As President of TOA, can you testify that you instructed — or that members of TOA were instructed to discuss this subject with members of the Legislature?

A. Yes.

Q. During 1969?

A. Yes.

Q. Prior to passage in 1969 of Senate Bill 781?

A. Right.

MR. NIEMANN: I offer Defendant's Exhibit No. 9 into evidence.

(Defendant's Exhibit No. 9
(was offered into evidence.

MR. KEITH: I object for all the reasons heretofore stated. It is obviously a phony document.

MR. DAVIS: And for the further reason that if it's offered as an alternative hearsay to show the effect on the hearer, that best evidence on the effect on the hearer or recipient would be the officials of the Legislature itself, alternatively the law that was enacted by the Legislature or, alternatively, the testimony of the Legislature itself, which obviously we cannot —

Q. Doctor, I asked you the simple question, did you discuss this letter with members of the Legislature?

A. Yes.

Q. Particularly the committee members?

A. Yes.

MR. ARNETT: I am glad the Plaintiff's attorneys note that the Legislatures, the effect on the Legislators of such exhibitions may be indicated in the bill and in the statute.

MR. DAVIS: But none has been offered into evidence.

Q. Did members of TOA lobby with members of the House and the Senate for the passage of Senate Bill 781 —

A. Yes.

Q. — as it was finally agreed upon between professional and commercial optometry and this special Senate committee?

A. Yes.

Q. Can you remember what specific committees in the House or the Senate were involved —

MR. KEITH: Those agencies would be the best evidence of which committee presented the bill and which committee they are.

MR. NIEMANN: I asked what members he talked to.

A. Yes, we appeared before the Senate and House Committee.

Q. Were the specific major elements of the compromise discussed by members of your association with the members of those legislative committees?

A. Yes.

Q. Was the concept of quality eye care discussed with them?

A. Yes.

Q. Concept of economic independence discussed with them?

A. Yes.

Q. Concept of law enforcement —

A. Yes.

Q. — discussed with them by members of TOA?

A. Yes.

Q. Is there anything in particular in the passage of this bill through the Senate that indicated this bill may have received more than normal passing attention by the Senate?

A. When the bill was presented on the floor of the Senate, Senators Creighton and Strong both got up and told the members of the Senate briefly of the committee that had considered it, and that both factions of the controversy in optometry had agreed to it, and they felt that this would result in not having the usual optometric fight that we had had for two or three sessions of the Legislature prior to that, and the Senators stood up and gave him a standing ovation. So, I think they were acutely aware of both the problem and the result of the compromise.

Q. Are you in a position to testify of whether or not the Senate had been lobbied by the members of TOA regarding this bill prior to its passage?

A. Yes, they had been.

Q. Are you aware whether or not — did members of TOA lobby for the passage of this bill?

A. Yes.

Q. Why was it necessary in view of the so-called vote to compromise?

A. We felt that there could be an attempt to amend the bill, which is always a possibility of the Legislature, and we wanted all the members of the House and the Senate to be aware of the fact that this was a compromise, that in that compromise was the agreement that there would be no changes on the floor of the House or Senate of any kind.

Q. Okay. Were the basic elements of the compromise and the reasons therefor discussed with members of the Legislature to your knowledge?

A. Yes, at length.

Q. Now, Doctor, I want to ask you one of the same questions that was asked earlier in depositions of members of the Optometry Board, and that is, can you tell us in your own words if there are reasons why the Legislature could have required Optometry Board members to be members of TOA?

A. I'm confident that both the members of that compromise committee, senatorial members and the members that voted to pass the bill in the House and the Senate were very much aware of our argument that one of the key provisions in the bill was the fact that four members of the Board would always be members of that association that's affiliated with American Optometric Association. And that the reason for this was that we believe that the members of the Texas Optometric Association would be more concerned with quality eye care, be more concerned with an adequate complete thorough examination, would be economically independent, free from influence of outside interests, more apt to act in behalf of the patient first and then economic interest of themselves or a third party last, and that their track record of the Texas Optometric Association and its mem-

bers in support be optometric education, the updating of the Optometry Act since its beginning in 1920, and clearly indicated that members of that association would be more apt to be concerned with law enforcement, adequate education, and therefore more apt to protect the public interest.

Q. You used the words "more apt," Doctor. Are you saying that members of the TOA have any magical superiority and competence or honesty or integrity or devotion or dedication than a nonmember of TOA?

A. No.

Q. Well, could you expound on the phrase you used, "more apt to be a better Board member"?

A. For instance, it's in the federal judiciary, the judges are appointed for life. The reasoning of the legislative act which provided for this was that in that way, they would be more apt to be free from outside influence, the fact that they were economically independent, that their jobs were secure for life, that they did not have to run for office would make it more probable that they would be impartial, completely honest and so forth. I think the Legislature felt that our argument followed this same line of reasoning, that TOA members would be more apt, more probable, more likely to serve the interest of the public in that — in their position on the Board. But it certainly would not guarantee that they would.

Q. Are you familiar with the testimony given earlier in this case by Dr. Friedman and Dr. Bowen regarding this same question? Are the TOA Board members better qualified to be —

A. Yes.

Q. — on the State Board?

A. Yes, I've read both depositions.

Q. Is your position inconsistent with their testimony?

A. Not at all.

Q. Would you explain that, Dr. Riley?

MR. KEITH: The question is argumentative. Any explanation he gives could only be argumentative in "How does my questions square with someone else's." He can give his testimony, and that's all.

MR. ARNETT: You can answer the question.

MR. DAVIS: I object to it on the further ground it constitutes an attempt to bolster the testimony of other witnesses.

MR. ARNETT: You can answer the question.

Q. Dr. Riley, can you say categorically that a TOA member will make a better Optometry Board member?

A. Absolutely not.

Q. Are you purporting to indicate that a — in any way or implying in any way that a member of TOA will make a better Board member? Does it have anything to do with their qualities as an individual, their competence as an individual?

A. It would not mean that they were a better person, that they were more honest, that they were more objective and so forth, but the probability that a TOA member would have the three quali-

ties I've already discussed would be much greater than it would be a non-TOA member would have those. I think the Legislature clearly recognizes that fact.

Q. Was this argument used with the Legislature?

A. It certainly was.

Q. By members of your association?

A. Yes.

Q. Prior to the passage of —

A. Yes.

Q. — the 1969 compromise bill?

A. Yes.

MR. ARNETT: I have got a couple of questions.

MR. KEITH: I object now to multiple lawyers interrogating the same witness.

MR. NIEMANN: Can we take a brief recess, please.

(Recess)

MR. KEITH: I take the position that this Intervenor, Niemann —

MR. NIEMANN: I am not the Intervenor.

MR. KEITH: TOA represents interests which are identical to those prosecuted by the Attorney General. Under the rules appertaining in this case and in the Eastern District of Texas, one counsel and one counsel only is entitled to interrogate a witness. Now, you all have chosen you wanted Mr. Niemann. I say that's

all the lawyers you are entitled to have interrogate the witness.

FURTHER DIRECT EXAMINATION

BY MR. ARNETT:

Q. Dr. Riley, did we discuss what current positions you hold in various organizations?

A. No, I don't think so.

Q. Would you like to tell the Court what positions you currently hold?

A. I'm on the Executive Committee of the Texas Optometric Association. I'm treasurer of the Foundation for Educational Research Division. I am Chairman of the Board of Texas Vision Services, President of TOA Credit Union, member of the Optometric Advisory Committee to the Selective Service Board, member of the Texas Medical Advisory Board to the Department of Public Safety.

Q. You mentioned TOA's activities and your activities and the organization of the College of Optometry in Houston. Did TOA take an official stance toward the creation of that college?

A. Yes, they did. They were not only officially on the record of supporting it, but through the efforts of TOA members, \$100,000 was raised to help financially support the college when it first started.

Q. You also mentioned you were Chairman of the Board from '71 to '73?

A. Right.

Q. Is this the Texas State Board of Optometry?

A. No, that's the Chairman of the Texas — Board of Directors of Texas Optometric Association. I have never served on the Board of Examiners.

MR. ARNETT: Okay. No further questions.

MS. PRENGLER: I would like to state for the record so it would be before the Court in this deposition that the motion was made by Mr. Niemann to participate on his own behalf in the deposition, and the order signed by Judge Fisher makes it clear that he was granted leave to participate in the deposition. And there was no understanding whatsoever that he would take the place of the Attorney General who is attorney of record in this case.

FURTHER DIRECT EXAMINATION

BY MR. NIEMANN:

Q. Dr. Riley, earlier, the objection was made to Defendant's Exhibit No. 5 for its failure to include an enclosure which was referred to in the letter. I hand you what was marked Defendant's Exhibit No. 5, and would you describe the enclosure that is referred to there?

A. The enclosure was House Bill 106, and the companion bill, Senate Bill 124, which was identical. And I have talked to our Executive Secretary's office, and they said that in that instance, the legislative service would ordinarily only furnish us with a copy of the one bill, and that that is what our records show, that we never had anything with the House Bill 106, that we did not send out a copy since we noted at the bottom that they were identical. So, we sent out only one of the bills even though we were referred to both of them.

MR. NIEMANN: I would like the court reporter to mark this as Defendant's Exhibit No. 5-A.

(Defendant's Exhibit No. 5-A
(was marked for identification
(by the court reporter.

Q. Dr. Riley, would you identify Defendant's Exhibit No. 5-A, and what does it purport to be?

A. It says, "Legislative Service." Copy of the House Bill 106 introduced by Nugent, and referred to the Committee on Public Health on 2-5-69.

Q. Is this a true and correct copy of the enclosure that was included in the February 17th, '69 TOA letter to its members marked Defendant's Exhibit No. 5?

A. Yes.

Q. Does Defendant's Exhibit No. 5 and Defendant's Exhibit No. 5-A constitute the entire mailout to the membership on that date?

A. Yes.

MR. NIEMANN: I offer Defendant's Exhibit No. 5-A into evidence.

(Defendant's Exhibit No. 5-A
(was offered into evidence.

* * *

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[By Mr. Keith]

Q. All right. Is there a charge for your service in connection with the examination and dispense of soft contact lenses?

A. Yes.

Q. What is that charge?

A. The charge is \$25 for the initial examination. \$30 additional if the contact lenses are considered to be suitable for the patient, the preliminary part of a soft lens examination is done. So, if a total examination, the normal routine examination and the additional testing that's done for soft lens patient are combined, it would be a total of \$55.

Q. What is the charge to the patient for the lens that you dispense?

A. \$150.

Q. So, the total charge is what?

A. \$305. In addition to the lens itself, there is a charge made for a 90-day supervision of the patient. There is no patient in my office that's fitted with either soft or hard contact lenses except on the basis of a complete fee which includes the initial examination, additional testing for wearing contact lenses and then 90 days supervision, and insurance warranties on the lens during that period.

Q. So, the total cost to the patient is \$305?

A. \$305, right.

Q. For Bausch and Lomb Soft Contacts?

A. Right.

Q. Your follow-up examinations cover what period of time?

A. Ninety days.

Q. Ninety days from the date of dispense?

A. The initial dispensing of the lenses.

Q. Any care or service or treatment required after 90 days that there is an additional fee for?

A. The only thing that routinely is held to 90 days exactly is the insurance coverage on hard contact lenses. The general rule is that if a patient has any problems beyond the 90 days, that his care is continued without additional charge for at least another 30 or 60 days.

Q. What is your charge for the examination and dispensing of hard contacts?

A. Your routine examination is \$25. The additional testing with hard contact lenses is \$10. The total fee is \$205. No, \$200. I'm sorry, \$200. The difference is the supervisory fee.

Q. Now, you said that you got a twenty — on soft contacts, you have a \$25 fee, \$30 fee, \$150 charge for the lenses and then \$100 supervisory or follow-up fee?

A. Right.

Q. What does that lens cost you that you charge \$150 for?

A. At Bausch and Lomb a lens from the laboratory is \$37.50.

Q. And then you have the —

A. For the lens which is \$75 a pair.

Q. All right. Plus the kit?

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- A. Plus the asepticing unit and so forth, the total laboratory cost is about \$100 to \$105.
- Q. I understood it was \$92. Is that wrong?
- A. I don't know. I just tell you what my understanding is. I can't be exact about that because it changes so often.
- Q. All right. How many patients do you examine and prescribe for in the course of a year?

* * *

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[In the United States District Court
for the Eastern District of Texas]

DEPOSITION OF DR. HUGH STICKSEL, JR.

[33]

- Q. And do you charge something in excess of the laboratory fee for the eyeglasses?
- A. Yes, as stated there.
- Q. So in other words the---
- A. Service.
- Q. ---can you give me an approximate cost on these eyeglasses from the laboratory?
- A. I really can't. I can tell you we deal with American Optical and Bausch and Lomb and you can get a price list from them that tells pretty close. I really don't know.
- Q. In other words, you do mark up the glasses that you receive from the laboratory, you charge more?
- A. Well, ours -- we do have what we consider a one-third, we have a cost plus one-third of material cost to cover depreciation, breakage and this type of thing.
- Q. Like a---
- A. Anything above that is related to professional services.
- Q. Fine.

MR. KEITH: Your cost plus one-third?

- A. Like if it was four dollars or let's say three dollars, one-third of that would be one dollar for the depreciation, breakage, this type of thing, you know, basically.
- Q. Isn't your income higher because you dispense glasses than if you were not to be in the dispensing business?
- A. I think without a doubt.
- Q. Without a doubt. What approximate portion of your income is due to your dispensing operation?
- A. I can't even give you -- I couldn't give you an approximation because I would have to sort it out. I have never done that. I have never done the statistics.
- Q. Well, for example, on a \$66 pair of eyeglasses you have a total of \$44 associated with other things than the examination, is that correct? In other words if someone came into your office and simply -- and you only examined their eyes and you sent them off to a dispensing optician for their glasses, you would receive a fee of what, 22 to 25 dollars?
- A. That would be 28 to 31.
- Q. 28 to 31. Okay. The additional---
- A. Six dollars.
- Q. ---three to six dollars?
- A. No, that would be six dollars added to either the 22 or six dollars added to the 25.
- Q. That is for what purpose?
- A. That serves three things. One is for writing

- prescription, then asking the patient to bring it back where we can verify that, then any final adjustment.
- Q. So in other words, if you were just to do that, perform that service of examining the eyes, writing the prescription, and making certain that the patient returns that prescription to conform -- the glasses conform with the prescription, then you would not receive the income in the amount of \$38 from the \$66 price, is that correct?
- A. Which figures are you now---
- Q. We are talking about a \$66---
- A. Charge.
- Q. ---charge.
- A. And you are taking what from that \$66, what figure?
- Q. We are taking \$38 from that. In other words, the lens and prescription services of \$22, frames and related services of \$18, and the FDA handling charge of four dollars, which totals \$44 less the six dollar charge which you would add for writing the prescription and making certain that the glasses conform to the prescription. So in other words, if you were not to be in the dispensing business as well as performing your professional services related to the eye examination, you would not realize this extra \$38.00 of revenue, is that correct?
- A. Less the cost of materials?
- Q. Well, I am not asking profit. I am just talking about your revenue, in other words, your---
- A. Yes, I think that---

Q. Okay. Would it be economically feasible in your practice not to engage in any dispensing operation, simply to write the prescription and -- to examine the eyes and write the prescription when necessary?

A. Yes, sir, I believe so with some changes.

Q. With what type of changes

A. Reducing the number of personnel that have to render the services, like you have four individuals right there that are involved totally in that area, so you would be eliminating overhead considerably---

Q. Why would you---

A. ---telephone, utilities, space.

Q. Why do you not do that?

A. You know, I don't know. That's a good question because we are seriously considering it and our thinking is moving toward federal health care. I think we are going to have to move more and more that way. I think that is a good question. I think we probably will move more in that direction.

Q. In other words, you are saying that you are planning to rid yourself of the dispensing end of the business?

A. I'm not -- I am saying we are thinking in that direction.

Q. But you have never actually done that?

A. No, but that's our---

Q. And in fact you find it to your economic advantage to be in the dispensing business as well as the profession of examining eyes, is that correct?

A. I believe I have already answered that yes.

Q. The answer is yes?

A. Yes.

Q. Are you familiar with the practice of ophthalmology under a trade name?

A. I have not really been exposed to it in Amarillo. There are no -- there are practices in ophthalmology but they are all under their own name. There is no trade name.

Q. Are you familiar with that practice or have you heard that that practice exists anywhere in the state of Texas?

A. Yes, I have heard that.

Q. Can you give me an example of a name that is used?

A. No, we had an example presented to the Board not too long ago. I think it might have been a fictional example. I don't know. I mean I don't think it was an actual name, was it?

MR. KEITH: Dr. Joe?

A. Yes, but I think he gave us a for instance. I don't think he used a real name.

MR. OLIVER: He was not an ophthalmologist.

A. Well, he was talking -- he was relating to an ophthalmological situation but I think he just gave us a name, I think. I think he was talking about Houston and Joe was talking about Austin.

Q. You were here, I guess, when we were taking depositions and the reference was to the Eye Clinic

in Dallas, a group of ophthalmologists practicing under that trade name?

A. Right.

Q. Do you see any adverse effects to the public by virtue of the ophthalmologists practicing under the aegis of that trade name?

A. Not so much the ophthalmologist as I do the optometrist.

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Q. Okay. Dr. Stickse, how are the people in Texas served by a majority of the Board being members of TOA?

A. Okay. I think the main way that people of Texas are served is that there can sometimes be at least four independent individuals who have no financial involvement or control from any other individuals or optical companies. For instance, there are certain contracts that certain individuals sign when they are associated with optical companies in which they can be terminated within 30 days or less. There are also certain guaranteed salaries that these individuals can receive, and it would be very hard, in my estimation, for an individual in this position to sit on the Board and to make independent decisions without being aware of possible economic consequences.

Q. Is that the only reason that you can think of?

A. Yes, sir, that's the only reason.

MR ROGERS: I would like the court reporter to

reread that reason because I didn't wholly comprehend it.

(The reporter read the
(answer as above set out.

A. I might also add to that statement that in certain situations individuals are furnished equipment and secretarial help by these optical concerns also.

Q. Can you cite a specific example of what you are talking about as relates to Dr. Mora?

A. No, sir.

Q. Or to Dr. Rogers?

A. No, I -- well, no, I couldn't.

Q. This is total speculation on your part, is it not?

A. Yes, sir, I think you asked me if there was any reason that I felt there might be a problem.

Q. Could that not be true of the TOA as well, those members of TOA?

A. You would have to give me a specific situation for me to be able to answer.

Q. Well, you can speculate as you speculated in your previous answer.

A. Well, I think that you can go back over a large number of votes and maybe question why votes came out sometimes the way they did.

MR. OLIVER: No, I think what he is asking is, wouldn't the TOA membership be subjected to the same type of thing because they might have a side-by-side

operation or guaranteed salary or furnished employees or furnished equipment free and all that stuff.

A. TOA?

MR. OLIVER: Yes.

A.

I don't know of any situation that---

Q. You don't -- what about being employed, for example, by Dr. Bowen or perhaps Dr. Friedman?

A. Being employed and working for them, I would think that that could apply.

Q. So in fact there is really -- would you like to reconsider your answer to the question of how is the public served by having four members of the Texas Optometric Association on the Board?

MR. OLIVER: Do you want to reconsider your answer?

A. Well, I think I will let it stand. I think rather than -- I would say it would be best served when individuals on the Board have no financial control by any outside interest, no possibility.

Q. In other words, you say no possibility of any economic interest in the industry?

A. No. Someone that could have economic control over them. For instance, say a private individual, a solo practitioner, for instance, not an employee, just a solo practitioner with nobody, no financial control over them.

Q. And of course that financial control could be exercised over a TOA member, could it not?

A. But not the individual, not the private practitioner, the solo individual.

Q. Well, the TOA member who is, let us say, affiliated with other members?

A. I would think in that situation, yes.

Q. So that there is no guaranty of not having a control situation in the case of a TOA member as well as a non-TOA member, is that correct?

A. Unless they are in solo practice.

Q. The provision in the statute does not restrict the Board members to a solo practice situation, does it?

A. No.

Q. It just restricts it to being four members of the TOA?

A. Right.

Q. So that your statement how -- or your answer to the question how is the -- could the public possibly be adversely affected or, rather, how could they be served by having a majority of TOA members, the only way they could be served in your statement is if the four TOA members were solo practitioners, is that correct?

A. Or if they are in partnership with---

MR. OLIVER: If they have equal say.

A. Yes, where they have equal say.

Q. I don't follow you.

A. Where they could not exert control over one or the other.

Q. So really it is not related to TOA membership at all; it is just the independence from outside influence, is that correct?

A. Say it again. I think that is what I am trying to say.

Q. In other words, the question is not whether a person is a member of the TOA or not a member of the TOA; it's just simply a question of whether the person, the Board member, is subject to control by outside influence---

A. Yes.

Q. ---is that correct?

A. Yes, that's correct.

[In the United States District Court
for the Eastern District of Texas]

DEPOSITION OF DR. JOHN BOWEN

[10]

Q. How long have you operated with these assistants?

A. It has been an evolution. We have been trying to get a smoother operation. We have had always employees, but the assistants started, oh, sometime last year.

Q. Do the assistants facilitate the examination process?

A. In the flow of patients, right.

Q. Does it cut the amount of time that you have to spend with each individual patient?

A. It is not in that way. It's just patient flow.

Q. Do you still see the same number of patients?

A. Approximately.

Q. What number is that on a daily basis?

A. It varies so I couldn't even tell you. Depends on -- see, we each have a different setup. We are a little bit different than anybody else around because I primarily do nothing but soft lenses with a few refractions and spectacles, so my situation is -- it varies so much during the day. It is checkups, progress checks on soft lenses and fitting soft lenses, et cetera.

Q. What is your examination charge for soft lenses?

A. \$325.

- Q. Is that the total package?
- A. That's the total deal. We don't have an examination fee for contact lenses.
- Q. What is your total fee for hard contacts?
- A. 250.
- Q. And that's the total package?
- A. That's the total deal.
- Q. What if a fellow comes in there and doesn't need contacts?
- A. Doesn't need contacts?
- Q. Right.
- A. What do you mean?
- Q. Well, if he comes in there and has spectacles and thinks he wants contacts, you perform an examination and decide he can't successfully wear them?
- A. Then it's just a regular examination fee.
- Q. What is that?
- A. You see, I don't ever quote a fee so you will have to let me -- bear with me a minute, and I really don't keep up with what that it, but I think the latest one is that -- well, for a full examination, not contact lenses, now, mind you, just---
- Q. Eyeglasses?
- A. Just what we call a visual analysis is 27 for somebody over 20, 21 -- below 21 we do not do the sphymometer on so it is five dollars less, so that's

- 22, and if they are over -- eight and under, it's 16.
- Q. All right. Let me go back so I may be sure I understand it. A child eight years old or younger is \$16?
- A. 16.
- Q. Between eight years and 21 years?
- A. 22.
- Q. \$22, and then over 21 the fee is \$27?
- A. 27 if we do a full situation. That's not an office call.
- Q. I don't understand that.
- A. In other words, we are talking about a full examination. If they come in and it is -- maybe they were seen six months ago and it's for a progress check, we don't do a full examination. We have seen them, you know, in a prior time.
- Q. Soft contacts are 325?
- A. That's right.
- Q. And your hard contacts?
- A. 250.
- Q. Now, how many progress checks does that include?
- A. Six months' service, and they vary. I hate to say. But there is not an additional charge for that until after six months.
- Q. And then what is the progress check after that?
- A. \$10 for the soft lens.
- Q. How did you arrive at this fee structure?

- A. That's what we wanted to charge.
- Q. But what went into the -- what components go into arriving at it?
- A. That's what we think it's worth.
- Q. Well, how do you arrive at worth?
- A. How do you arrive at worth? I mean we decide it's worth that much; that's what we charge. You know, it is a free country.
- Q. Well, can you tell me the factors that you consider in arriving at worth?
- A. I don't think I -- I can't. I mean not -- that's a nebulous statement, what is worth.
- Q. Do you consider difficulty or novelty of the services you render?
- A. Experience and knowledge and that's all I can -- you know, I mean, your background.
- Q. Do you consider competition?
- A. No.
- Q. What is or is not generally comparable for like services charged in the area?
- A. Of course we are higher than everybody in Lubbock.

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[14]

- Q. How much higher are you than other people in Lubbock?
- A. I really don't know but I do know we are the high.

- Q. How do you know that?
- A. I have just heard fees discussed at society meetings, and they vary, but as I said, normally they are \$300 and we are three and a quarter.
- Q. You are talking now about contacts?
- A. Yes.
- Q. What about examination fees?
- A. I don't have any idea what they charge.
- Q. Was there any reason why you are \$25 higher than someone else on contact lenses?
- A. Because I think we do a better job.
- Q. Do you sell the same product?
- A. I don't sell a product.
- Q. You don't manufacture contact lenses either, do you?
- A. No.
- Q. You are selling a patient -- providing to the patient the same contact lens that somebody down the street is?
- A. No, it depends on what lens you wind up with. That's the secret. There is a lot of lenses.

* * *

[In the United States District Court
for the Eastern District of Texas]

Deposition of Dr. Sal Mora

[7]

Q. How long have you practiced at that location either as a single-door or as a two-door operation?

A. Since about 23 years.

Q. All right. Now, at the time and right before you converted to a two-door, were you the only optometrist in the office?

A. Yes, sir.

Q. Did you examine eyes?

A. Yes, sir.

Q. Did you prescribe lenses?

A. Yes, sir.

Q. And then did that office also fill the prescription and dispense it?

A. Yes, sir.

Q. At the time you converted from a single-door where the optometrist and the dispensing optician were in the same office, when you converted from that to a separation of the optometrist and the optician, did the patient experience an increase in cost for his eye examination and glasses?

A. Well --

MR. OLIVER: Did you say for his eye examination and glasses?

Q. Yes, the total package. Did it cost him more?

A. Yes.

Q. And what basically was the difference in the cost?

A. The patient started paying separate for the examination.

Q. Previously when the optometrist and the optician were in one office there was just one charge, is that correct?

A. One charge.

Q. Then after the separation there became two charges?

A. Yes.

Q. Now, after the separation the patient ended up paying more money?

A. Yes.

Q. All right. Now, can you tell the court what the difference in the total cost to the patient was after the change? I don't mean in dollars but was it related to something specific?

A. I don't understand what you mean.

Q. Well, was the difference substantially the

A. I don't understand what you mean.

Q. Well, was the difference substantially the -- did the patient pay substantially the examination fee, was that the additional charge that he ended up paying?

A. Yes.

Q. Do you presently have a normal examination fee?

A. Yes.

Q. And what is that, Dr. Mora?

A. \$10.

Q. \$10. And has that been true for several years?

A. No, it hasn't.

Q. Has it been true ever since you have been separated from the opticianry?

A. No, it hasn't.

Q. When you first separated from the optician side do you recall what your examination fee was?

A. We started at five dollars.

Q. All right. So that when you were operating as a single-unit optometrist and optician in one door, let's say the patient paid \$20 for a pair of glasses. After you converted to two-door then the patient paid 25, is that what I understand?

A. More or less. See, all these prices have fluctuated due to inflation.

Q. I understand, but at the time you made the change the patient's cost went up about the cost of the examination?

A. Yes.

Q. All right, sir.

A. But what I meant, price -- part of this increase was brought, being due to inflation of the times.

Q. I see. Then likewise your examination fee has gone from five to ten dollars?

A. Yes.

Q. So has bread and milk and ice. Now, Dr. Mora, there has been and will be further evidence in this case that within the profession of optometry in Texas there are basically two factions.

A. Yes.

Q. One of them we will say represented by TOA, and one of them represented by others.

A. Yes.

Q. To your knowledge, as a member of the profession, how long have these factions existed?

A. Well, I guess they existed as long as I can remember.

Q. All right. What do the factions basically dispute over?

A. The main difference is -- I believe it's advertising.

Q. All right. Is there any dispute that you observe over the proper way to examine the patient's eyes?

A. Yes, I believe there was.

Q. Is there now?

A. Not now, I don't believe.

Q. Is there any dispute over the prescription that should be provided a patient for a particular eye disorder?

A. You mean now?

Q. Yes.

A. I don't think so.

Q. What does the dispute center on if it doesn't center on patient care?

A. Mostly on the mode of doing business.

Q. Now, as a member of the Optometry Board for the last five or six or seven years, has this dispute arisen within the Board itself, that is, between the two factions?

A. In what sense?

Q. Have there been some divided votes, basically four to two votes on certain issues?

A. Yes.

Q. And what basically have those issues been related to?

A. For the same reason I gave. It is the mode of doing business.

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